In the United States Court of Appeals for the Fifth Circuit

No. 29332

BIRDIE MAE DAVIS, ET AL, PLAINTIFFS-APPELLANTS-CROSS APPELLEES, AND UNITED STATES OF AMERICA, ETC., PLAINTIFFS-INTERVENOR-APPELLANTS-CROSS APPELLEES

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL, DEFENDANTS-APPELLEES-CROSS APPELLANTS, AND TWILA FRAZIER, ET AL, INTERVENORS-APPELLEES

Appeals from the United States District Court for the Southern District of Alabama

(August 4, 1970)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

BELL, *Circuit Judge:* We consider again the Mobile School case. This time it comes to us on a motion for injunctive relief pending application for certiorari; or in the alternative, that we vacate the order of the district court entered on July 13, 1970 in implementation of our decision of June 8, 1970 as to student assignment. We deny injunctive relief and modify the order of July 13, 1970. In addition, we require that a bi-racial advisory committee to the school board be established forthwith.[1]

[1] We treat this motion as a part of the previous appeal since the relief sought goes to the efficacy of the mandate of this court. For such purposes and so that our previous mandate may be amended, the mandate of the court is recalled.

It will be necessary to review the action in the district court since the issuance of the mandate of this court pursuant to our decision of June 8, 1970. The appeal which gave rise to that decision came to us in the posture of the Mobile school system being operated in an unconstitutional manner with respect to faculty and staff as well as student assignment. We reversed with direction. The direction was to order that the faculty and staff ratio which was decreed in *Singleton v. Jackson*, 5 Cir., 1969, 419 F.2d 1211 (en banc consideration of Mobile and 12 additional school desegregation cases), be effected throughout the system. We also directed that the majority to minority transfer provision of *Ellis v. The Board of Public Instruction of Orange County, Florida*, 5 Cir., 1970, —— F.2d —— [No. 29,124, slip opinion dated February 17, 1970], be required. The district court carried out this direction explicitly in an order dated June 12, 1970.

We also directed that a bi-racial committee be established to advise with the school board, and that stated duties be assigned the bi-racial committee. The district court stated in the order of June 12, 1970 that a supplemental order would be entered to effectuate this direction. Appellants state that the bi-racial committee has not been established.

With respect to the student assignment plan as revised by the district court in its order of July 13, 1970, some background is necessary. The case came to us with 60 per cent or 18,623 of the total of 30,884 Negro students assigned to 19 all Negro or virtually all Negro student body schools. We studied the several proposed student assignment plans in the record on appeal and concluded that the Department of Justice plan would disestablish the dual school system if modified in some particulars. Under that plan, as

modified by us, the Mobile school system would open in September 1970 with no all Negro or virtually all Negro high or junior high schools and with only 8 all Negro elementary schools. The number of Negro students attending these all Negro or virtually all Negro student body schools was reduced from 18,623 to 7,725 or 25 per cent of the total, and these in grammar schools only. Every Negro child would receive an integrated junior high and high school education.

In addition to directing that the district court draw a new zone line so as to desegregate Toulminville High School (all Negro), we recognized the possibility of the figures on which we relied being inaccurate. In footnote 4 we said:

> The defendants warn that the figures used by the Department of Justice and HEW are inaccurate. This may be true but the defendants, the only parties in possession of current and accurate information, have offered no help. This lack of cooperation and generally unsatisfactory condition, created by defendants, should be terminated at once by the district court. Such errors in information as do exist may be corrected and the situation adjusted accordingly by the district court.

It developed on remand that there were inaccuracies. For example, according to the order of the district court dated July 13, 1970 (chart attached to order showing racial composition and capacity of schools, reproduced infra), our plan made no provision for the 6th grade children in the Indian Springs school. Our plan, which was based on the plans of record, was also in error in some instances as to school capacity, i.e., the schools would not accommodate the numbers contemplated. In this connection we assigned 2,886 students to Phillips Junior High which has a permanent capacity of 980. There were other such

errors but not of this magnitude. We knew that some of the schools had portable class rooms but the record did not disclose the number.

At any rate, our view was and is that the exigencies of the situation required that this court promulgate a plan of student assignment meeting constitutional standards for immediate implementation rather than to continue the backing and filling which is inherent in the appellate and remand process, and which had been demonstrated by the many previous appeals of this matter including two during the 1969–70 school term. We consider school desegregation cases as presenting important public questions deserving of decision and facilitation in the most expeditious manner within the limits of due process and judicial propriety.

It was never our thought, although appellants seem to think otherwise, that the district court was stripped of its discretion to adjust the assignment plan to the end of making it workable. The district court could not, of course, make changes which would diminish the plan from the standpoint of constitutionality nor diminish the extent of the desegregation required by this court.

Indeed, immediately upon receipt of our decision, the defendant school board moved for rehearing on the ground that it was not possible to implement the plan of the decision, pointing to several errors. The motion was denied, the court being of the opinion that such problems or errors as might exist in the plan were for adjustment by the district court.

We turn then to the plan as revised by the district court to determine if the revisions amount to an improper departure from our decision. As stated, the plan of this court left 8 all Negro or virtually all Negro schools (all elementary), with 25 percent of the Negro student population assigned to them. The dis-

trict court reduced the number of such schools to 7, with a total of 6,085 students or 19 percent of the Negro student population assigned to them. One of these, the Council school, which is considered by us as virtually all Negro, is to have 40 white students assigned along with 427 Negro students whereas in our plan only 4 whites were to be so assigned.

The district court proceeded from the standpoint of the zoning of the whole district. We considered only that portion of the system east of Highway I–65 except where necessary to go to the west to aid in reducing the number of all Negro schools. The problem was that a majority of the Negro population was concentrated within the city to the east of I–65. In revising our plan, the district court finalized the zoning for the entire system including elementary, junior high and high schools. The feeder system outlined in its order of July 13, 1970 is based on the school zone lines and is nothing more. It is in no way a departure from the applicable zones.

The differences between the plan contained in our June 8, 1970 opinion and the revised district court plan are reflected in the following charts which are a part of the order of the district court of July 13, 1970:

High school

Name of school	Grade	U.S. district court plan		Fifth circuit plan		Total under district court plan	Permanent capacity
		White	Negro	White	Negro		
Rain	7-12	1143	112	1150	97	1255	98
Williamson	10-12	824	491	880	471	1315	126
Murphy	10-12	1300	1027	1643	1761	2327	251
Toulminville	10-12	247	420	9	740	667	69
Blount-Carver	9-12	1022	1693	854	1846	2715	287
Vigor-Bienville	9-12	1000	1425	1134	1211	2425	228
Shaw	9-12	1312	237	1250	240	1549	183
Davidson	9-12	2201	80	2202	72	2281	196

Middle school

Name of school	Grade	U.S. district court plan		Fifth circuit plan		Total under district court plan	Permanent capacity
		White	Negro	White	Negro		
B. C. Rain	7-12	1143	112	1150	97	1255	868
Banes	6-9	770	220	1292	977	990	1148
Hall	6-9	336	910	1292	977	1246	1224
Dunbar	6-9	170	770	181	985	947	1064
Central	6-9	387	1164	468	1260	1551	1508
Washington	6-9	748	700	1170	1716	1457	1015
Phillips	6-9	417	695	1170	1716	1112	980
Trinity Gardens	6-8	320	540	380	690	861	868
Prichard	6-8	220	458	240	410	678	615
Mobile County Training	6-8	333	885	432	859	1218	1232
Clark	6-8	703	846	536	948	1549	1392
Scarborough	6-8	884	11	638	77	895	896
Hillsdale	6-8	451	210	431	217	661	784
Azalea Road	7-8	996	38	1039	38	1034	986
Eight Mile [1]	1-8	549	110	[1] 280	[1] 66	659	598

[1] District court plan grade structure is 1-8 and the Fifth Circuit's Plan grade structure is 1-6.

Elementary school

Name of school	Grade	U.S. district court plan		Fifth circuit plan		Total under district court plan	Permanent capacity
		White	Negro	White	Negro		
South Brookley	1-6	490	71	502	71	561	408
Williams	1-6	561	45	571	43	606	408
Morningside	1-5	672	0	631	0	672	544
Maryvale	1-5	402	257	441	117	659	544
Craighead	1-5	300	506	347	489	806	850
Council	1-5	40	427	4	391	467	544
Arlington	1-5	163	178	160	170	341	476
Caldwell	1-5	87	431	0	350	518	510
Leinkauf	1-5	118	303	273	165	511	442
Owens	1-5	2	1,300	2	1,414	1,302	1,428
Old Shell Road	1-5	482	7	332	295	489	476
Woodcock	1-5	255	0	424	167	255	570
Marx	1-5	415	110	496	104	525	510
Fonville	1-5	37	787	0	1,000	824	1,088
Westlawn	1-5	384	0	532	0	384	510
Crichton	1-5	379	329	438	348	708	714
Stanton Road	1-5	5	826	6	900	831	1020
Frazier	1-5	0	1120	10	1022	1120	1156
Grant	1-5	30	850	15	1285	880	1122
Glendale	1-5	65	480	434	931	545	884
Palmer	1-5	235	435	434	931	670	868
Whitley	1-5	261	314	216	481	655	578
Robbins [1]	1-5	0	775	638	855	775	850
Hamilton [1]	1-5	630	15	638	855	645	646
Thomas	1-5	180	95	180	93	275	272
Whistler	1-5	181	205	181	205	386	510

See footnotes at end of table.

Elementary school—Continued

Name of school	Grade	U.S. district court plan		Fifth circuit plan		Total under district court plan	Permanent capacity
		White	Negro	White	Negro		
Chickasaw	1-5	443	0	473	100	443	612
Eight Mile [1]	1-8	549	110	290	[2] 66	659	868
Indian Springs [3]	1-6	445	15	535	11	460	408
Orchard	1-5	714	161	754	113	875	814
Forest Hill	1-5	624	0	560	0	624	575
Will	1-5	534	299	657	175	833	816
Austin	1-5	488	10	396	22	498	408
Dickson	1-6	726	5	835	193	731	782
Fonde	1-6	773	13	679	11	786	850
Shepard	1-6	415	29	409	29	444	544
Dodge	1-6	503	50	675	65	553	816
Corgas [4]							

[1] These schools will be integrated by pairing (discussed hereinafter;.
[2] District court plan grade structure is 1-8 and the fifth circuit plan is grade structure 1-6.
[3] Fifth circuit plan made no provision for 6th grade at Indian Springs.
[4] Closed.

We approve the plan as revised by the district court with one exception. The plan of this court required the pairing of Palmer and Glendale, Robbins and Hamilton, and Eanes and Hall. The latter two are junior high schools. The district court plan eliminates this pairing requirement. This is proper except as to Robbins and Hamilton. These schools are contiguous; Robbins continues with an all Negro student body while Hamilton is predominantly white. The district court is directed to amend its plan so as to pair these two schools. This will reduce the number of all Negro student body schools to 6 with a total of 5,310 or 17 per cent of the total Negro student population assigned to such schools. Thus it is that with this modification of the district court plan, the revised plan achieves an improved result.

We are left with the feeling that this case would not again be here if the revisions had been considered by a bi-racial advisory committee. We directed in our decision of June 8, 1970 that the promulgation and

maintenance of zone lines be a matter, among others, for consideration by the bi-racial committee.

The motion of appellants for an order that the district court be required forthwith to carry out our direction to establish a bi-racial committee is granted.

The motion of appellants to vacate the order of July 13, 1970 of the district court is denied subject however to it being amended as stated herein by pairing Robbins and Hamilton.

The motion to implement the student assignment plan set out in our decision of June 8, 1970 is denied in light of the fact that we have now approved an improved plan which the district court is directed to effectuate upon receipt of the mandate of this court.

The motion to retain jurisdiction in this court with the district court to be used as a special master, cf. *Alexander v. Holmes County,* 1969, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19; *United States v. Hinds County,* 5 Cir., 1969, 417 F.2d 852, is denied. Such a procedure seems unnecessary in view of the expedited appellate procedures now applicable in this circuit. See *Singleton v. Jackson,* supra, 419 F.2d at 1222, and the procedure outlined in footnote 2 to our decision in this matter of June 8, 1970.

This opinion and order amends and supplements our decision and order of June 8, 1970, and together, they shall be considered the final order on this appeal for mandate and certiorari purposes.

Meanwhile, the district court is to proceed to carry out the mandate of this court to the end of converting the dual school system of Mobile County into a unitary system as directed notwithstanding any application for certiorari.

In the United States District Court for the Southern District of Alabama, Southern Division

Civil Action No. 3003–63

BIRDIE MAE DAVIS, ET AL, PLAINTIFF, AND UNITED STATES OF AMERICA BY RAMSEY CLARK, ATTORNEY GENERAL, ETC., PLAINTIFF-INTERVENOR

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL, DEFENDANTS, AND TWILA FRAZIER, ET AL, INTERVENORS

ORDER APPOINTING BI-RACIAL COMMITTEE

Pursuant to Order of this Court of July 28, 1970, the following are hereby appointed as a Bi-Racial Committee in this cause for the purposes hereinafter recited: Dr. Sanford D. Bishop, Mr. Isom Clemon, Mr. M. C. Farmer, Mrs. H. Eugene Gibbons, Mrs. T. C. Gill, Mr. Arthur Outlaw, Bishop W. T. Phillips, Mr. O. B. Purifoy, Mr H. Minge Reed, Jr., and Mr. Beverly R. Wilson, Jr.

This Committee shall have the responsibility:

(1) To recommend to the Mobile County School Board and the Court ways to maintain a unitary system.

(2) To review the operation of the majority to minority transfer rule and the transportation system.

(3) To assist the Mobile County School Board in presenting to the Court problems encountered by the Board in the operation of its desegregation plan heretofore or hereafter modified and approved by this Court or the Court of Appeals for the Fifth Circuit.

(4) To consider the selection of school sites and suggest other special assignments as the Court may direct.

The Committee is authorized to make recommendations to the School Board and the Court in connection with these activities. The Chairman is to alternate annually between the races. Mr. Beverly R. Wilson, Jr. is appointed Chairman for the ensuing twelve months.

DONE at Mobile, Alabama, this the 12th day of August 1970.

DANIEL H. THOMAS,
United States District Judge.

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Civil Action No. 3003–63

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ORDER

Pursuant to the Order of the United States Court of Appeals for the Fifth Circuit of August 4, 1970, in this case, the Order of this Court of July 13, 1970, as amended July 30, 1970, is *further amended* so that the elementary schools known as Robbins and Hamilton are to be paired.

DONE at Mobile, Alabama, this the 12th day of August 1970.

DANIEL H. THOMAS,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1970